IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

PHIL BREDESEN, Governor of the State of Tennessee,	)	
Plaintiff/Appellee,	)	
v.	)	Case No. M2006-02722-SC-RDM-CV
	)	DAVIDSON CHANCERY
TENNESSEE JUDICIAL SELECTION COMMISSION,	)	06-2275(III)
Defendant,	)	
and	)	
J. HOUSTON GORDON and GEORGE T. LEWIS,	)	
Intervenors/Cross Claimants/ Appellants.	)	

BRIEF OF INTERVENOR LEWIS

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JURISDICTIONAL STATEMENT

This Court has properly assumed jurisdiction of this case pursuant to Tenn. Code Ann. § 16-3-201.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the trial court erred when it held that the Tennessee Human Rights Act does not apply to the rejection of Lewis and Gordon because 42 U.S.C. § 2000e(g) excludes the application of Title VII from the appointment of policy-level appointees.

II. Whether the trial court erred when it held that Lewis and Gordon's state and federal constitutional rights to equal protection of the law did not restrict the Governor's discretion to reject a panel of nominees based solely upon the race of the nominees.

STATEMENT OF THE CASE

This suit was initiated by Plaintiff, Phil Bredesen, Governor of the State of Tennessee ("Governor"). The Complaint asked the Chancery Court to declare that Tenn. Code Ann. § 17-4-112(a) requires that when the governor rejects a panel of nominees for a judicial vacancy, the second panel submitted to the Governor should contain three (3) names, each of which is different from the nominees listed on the first panel. (R. 1.) The Defendant, Tennessee Judicial Selection Commission ("Commission"), filed an Answer disputing the Governor's construction of the statute. (R. 22.) The Commission's Answer also raised two affirmative defenses: (1) in rejecting the first panel, the Governor

violated the Tennessee Human Rights Act ("THRA"). Tenn. Code Ann. § 4-21-101; and (2) in rejecting the first panel for no other reason than its racial composition, the Governor violated the United States and Tennessee Constitutions. (R. 24.)

Soon after the Commission's Answer was filed, J. Houston Gordon (hereafter "Gordon") filed a Motion to Intervene and related pleadings. (R. 41.) Gordon's pleadings asserted, as had the Commission's, that the Governor's rejection of Lewis and Gordon violated their rights under the THRA and the United States and Tennessee Constitutions. (R. 41; R. 76.) In addition, Gordon's pleadings asserted that the Governor's rejection of Lewis and Gordon was a nullity because the Governor did not have the authority to reject a panel of only two (2) nominees. (R. 75.) Gordon's argument was, and is, that the Governor may only appoint or reject a complete panel of three (3) nominees. (R. 75.)

Shortly after Gordon filed his Petition to Intervene, Lewis also filed a Motion to Intervene. (R. 84.) Lewis' pleadings also asserted that the Governor's rejection of the Lewis and Gordon panel violated Lewis and Gordon's rights under the Tennessee Human Rights Act and the United States and Tennessee Constitutions (as well as the Governmental Employee Rights Act). (R. 158.)

On December 13, 2006, a hearing was held in the Chancery Court of Davidson County on all of the parties' Motions for Summary Judgment. The next day, on December 14, 2006, the Chancery Court issued its Memorandum Opinion and decision denying the Motions for Summary Judgment filed by Gordon, Lewis and the Commission based upon the Tennessee Human Rights Act, the United States and

Tennessee constitutional issues, and the statutory argument submitted to the court by Gordon. (R. 231.) The trial court's order also granted the Governor's Motion for Summary Judgment on the issue of whether or not Gordon's name could properly appear on the second panel sent to the Governor following the rejection of the first panel. (R. 231.)

It is from the Chancery Court's order of December 14, 2006 that Lewis appeals. (R. 256.)

STATEMENT OF FACTS

Justices Riley Anderson and A.A. Birch retired from the Tennessee Supreme Court effective August 31, 2006, thereby creating two vacancies on this Court. (R. 29) Pursuant to the Tennessee Plan, the Commission began accepting applications and scheduled a public hearing and applicant interviews for April 20, 2006, for the purpose of filling one of these two vacancies. (R. 57.) Among the applicants who applied for this vacancy were three appellate judges, three trial judges, and five practicing attorneys. (R. 57.) All of the applicants were male, and three were African-Americans. (R. 57.) After reviewing the applications, conducting the statutorily-mandated investigations into the applicants' backgrounds, holding public hearings, and conducting private interviews with the applicants, the Commission sent the names of Gary Wade, Richard Dinkins and J. Houston Gordon to the Governor for appointment. (R. 57.) This panel of nominees included one African-American applicant, Richard Dinkins. After interviewing each of the nominees, the Governor appointed Judge Wade to this Court on May 30, 2006, fifty

days after the panel was recommended. (See www.tsc.state.tn.us/geninfo/Bio/Supreme/Biosc.htm.)

The Commission then gave public notice that it would begin to accept applications for the remaining vacancy on the Tennessee Supreme Court. (R. 57.) The Commission conducted the statutorily-mandated background investigations, reviewed the applications, and conducted public hearings and private interviews with the applicants on July 17, 2006. (R. 57.) At its July 17, 2006 meeting, the Commission had before it nine male applicants, including four African-American applicants. (R. 57.) On July 18, 2006, the Commission recommended to the Governor the names of Richard Dinkins, J. Houston Gordon and George T. Lewis as the three persons "best qualified and available to fill the vacancy" pursuant to Tenn. Code Ann. § 17-4-109(e). (R. 140, Ex. A.) This panel was identical to the panel sent to the Governor on April 20, 2006, except that Lewis' name replaced the name of Judge Wade. (R. 140, Ex. A.) With respect to each vacancy, all of the applicants were required to sign a statement, contained in the application, that they were willing to serve if appointed by the Governor. (See www.tsc.state.tn.us/geninfo/Publications/Forms/JudicialApplications/judapp.doc at p. 12, question 63.)

On July 24, 2006, six days after the Commission certified the names of Dinkins, Gordon and Lewis to the Governor, Chancellor Dinkins formally withdrew his name from consideration. (R. 140, Ex. B.) Chancellor Dinkins' letter is filed as Exhibit "B" to the Complaint in this cause. At that point, the Governor had not conducted interviews with any of the nominees on the panel. (R. 161.)

At approximately noon on July 24, 2006, six days after Lewis and Gordon were recommended by the Commission and the same day that Chancellor Dinkins withdrew his name from consideration, calls were placed by Deputy Governor Dave Cooley to Lewis and Gordon advising them that Chancellor Dinkins had withdrawn and that the Governor was returning the panel to the Commission. (R. 160.)

The same day, July 24, 2006, a letter from the Governor was faxed and mailed to the Commission Chair, District Attorney General Michael Bottoms, in which the Governor stated that due to Chancellor Dinkins' withdrawal, he was "writing to return to the Judicial Selection Commission the panel of nominees certified to me last week for the vacancy on the Tennessee Supreme Court." (R. 30; R. 140.) In his letter, the Governor stated:

> This state has been privileged over the last thirteen years to have an excellent Supreme Court that reflects the diversity of Tennessee. As you know, I have always sought to appoint judges who meet the highest professional and personal standards. Among such highly qualified persons, diversity is a significant factor that I believe should be considered. **With Chancellor Dinkins' withdrawal, I no longer have the opportunity to consider that factor.**

(Emphasis added.)

The Governor gave no reason other than the fact that unlike Chancellor Dinkins, Lewis and Gordon are both Caucasian. (R. 30, Ex. C.) The letter requested that the Commission send the Governor a new panel of nominees that included qualified "minority" candidates. (R. 30, Ex. C.) Lewis was never interviewed either by the Governor or any of his representatives between the time that his name was recommended

on July 18, 2006, and the time that the Governor rejected his name on July 24, 2006. (R. 161.)

The Commission called a special meeting for August 8, 2006. After lengthy discussion in a meeting open to the public, a majority of the Commission members voted that the Commission ask the Governor to clarify in writing whether he intended to reject the entire panel in his July 24, 2006 letter and, if so, to state his reasons for rejecting the panel. (R. 141.) On August 9, 2006, General Bottoms, the Chair of the Commission, forwarded this written request to legal counsel for the Governor. (R. 141.) This letter is Exhibit "D" to the Complaint in this cause. (R. 141.)

On the same day, August 9, 2006, the Governor responded with a second letter, Exhibit "E" attached to the Complaint in this cause. (R. 30, Ex. E.) The Governor stated that he had, in fact, "rejected the first panel of nominees." The Governor stated no additional reason for his decision. Rather, his second letter stated, "I rejected the panel for **the reason** stated in my previous letter." (Emphasis added.) There has never been any correspondence from the Governor or public statement made by the Governor to suggest that there was any reason for the rejection of the panel other than the fact that Lewis and Gordon are both Caucasian. Accordingly, during oral argument before the Chancery Court on December 13, 2006, the Assistant Attorney General, in response to a question from the Chancellor, conceded that Lewis and Gordon were rejected because of their race. (Chancery Court oral argument, pp. 47-48.) (The transcript of the hearing was completed on January 9, 2007. The parties have agreed that it may be part of the record

on appeal. No order, however, had been entered to that effect when this brief was filed, so it has been reproduced in the Appendix.)

On August 22, 2006, the Commission met in a public hearing and adopted by a one vote majority a resolution allowing all applicants to be considered for the second panel. The Commission determined, pursuant to that resolution, that a *per se* rejection of any applicant on the basis of race was unconstitutional and that all earlier applicants would be considered unless an applicant affirmatively directed the Commission not to consider the applicant. (R. 141, Ex. F.) On September 5, 2006, the Commission met again and again held a public hearing and private interviews with the applicants. Seventeen individuals, including nine minority applicants, presented themselves for consideration by the Commission. (R. 61.) On September 7, 2006, the Commission sent the names of D'Army Bailey, William C. Koch and J. Houston Gordon to the Governor. (R. 30; R. 141.)

Never, at any point in the selection process or at any point during this litigation, has the Governor, or any member of his administration, or the Attorney General on his behalf, suggested that there was any reason for the rejection of the first panel other than the fact that Lewis and Gordon are both Caucasian.

SUMMARY OF ARGUMENT

The Governor's rejection of the first panel violated the Tennessee Human Rights Act as well as the equal protection guarantees contained in the United States and Tennessee Constitutions. The THRA, Tenn. Code Ann. § 4-21-101, *et seq.* is comprehensive, remedial legislation, and the purpose of the act is to safeguard all

individuals from discrimination. *Killingsworth v. Ted Russell Ford, Inc.*, No. E2004-02597-SC-R11-CU, 2006 LEXIS 900 (Tenn. Oct. 13, 2006) (see Appendix). The state has never given any reason for the Governor's rejection of the first panel other than the racial composition of the panel. Lewis and Gordon were treated differently than similarly-situated, African-American applicants would have been treated because the Governor's letter makes it clear that "minority" nominees would not have been rejected. Tenn. Code Ann. § 4-21-102(3) prohibits any direct or any indirect act of exclusion based upon race. Tenn. Code Ann. § 4-21-401 provides that discrimination on the basis of race is unlawful and that limiting, segregating, or classifying "applicants" for employment in "any" way that would deprive or "tend" to deprive them of employment opportunities is unlawful.

The trial court erroneously read into the THRA an exclusion for policy-making appointees which is not found anywhere in the THRA. The trial court's approach to statutory construction is completely contrary to this Court's long-standing approach to the interpretation of Tennessee statutes. The trial court's analysis is even inconsistent with Section 708 of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-7, entitled, "Effect on State Laws." This section provides that no provision of Title VII should be interpreted to limit the reach of existing state laws or state laws enacted in the future. The trial court's approach is also contrary to the Governmental Employees' Rights Act of 1991, 42 U.S.C. § 2000e-16c(a)(ii). This section of the Civil Rights Act specifically makes it unlawful to discriminate on the basis of race and specifically applies to individuals chosen or appointed by a person elected to public office in any state, including appointees at the policy-making level. Thus, the trial court's conclusion is contrary to Section 708 of

Title VII as well as to the Governmental Employees' Rights Act of 1991. The conclusion of the trial court is also contrary to this Court's own Equal Employment Opportunity policy promulgated on May 1, 2006, thirteen weeks before the Governor's rejection of the first panel. (Administrative Policy 2.02.) Finally, the trial court's conclusion is contrary to Rule 1500-1-.11(5) of the Tennessee Human Rights Commission which provides that the THRA supersedes any federal guideline or regulation which is inconsistent with the THRA.

The rejection of the first panel also violated the United States and Tennessee Constitution's guaranty of equal protection. Because the first panel was rejected solely due to the racial classification of Lewis and Gordon, the rejection of the first panel is presumptively invalid. This Court must review the rejection of the first panel applying strict scrutiny. The rejection cannot pass constitutional muster in absence of a finding by the Court that the rejection was necessary to achieve a compelling state interest and that the rejection of the first panel was narrowly tailored to achieve a compelling state interest. Contrary to the trial court's opinion, at least three decisions of the United States Supreme Court deal with the extent to which state government may classify applicants on the basis of race in the interest of diversity. Those cases, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), *Gratz v. Bollinger*, 539 U.S. 270 (2003), and *Grutter v. Bollinger*, 539 U.S. 323 (2003), were neither cited nor discussed by the trial court. Taken together, these cases make it clear that the rejection of the first panel for no reason other than its racial composition was unlawful under the Tennessee and United States Constitutions. These decisions considered collectively indicate that race may sometimes be considered as a plus factor along with all of the other individual

characteristics of the applicants, but only when there is proof of a compelling state interest and only when there is proof that the racial classification is necessary and is part of a narrowly-tailored policy. Here, there is no evidence whatsoever in the record that the exclusion of Lewis and Gordon satisfied any state interest, compelling or otherwise. There is no showing that the rejection of Lewis and Gordon was necessary and no showing that the rejection of the first panel was part of a narrowly-tailored policy.

Because the rejection of the first panel violated the THRA, the United States Constitution, and the Tennessee Constitution, the most appropriate remedy in this case is to declare that the Governor's duty is to fill the remaining vacancy on this Court from the remaining members of the first panel. This remedy places the members of the first panel in the same position which they were in before the unlawful rejection occurred. This remedy is consistent with past practice when applicants have withdrawn from consideration. This remedy, if this Court sees fit, pretermits any issues regarding the eligibility of other applicants and whether the Commission has the authority to send an additional name to replace the name of a nominee who withdraws.

Finally, a decision from this Court reversing the trial court will stand as precedent for the basic fundamental proposition that state government may not reject applicants or panels of applicants solely on the basis of their race.

STANDARD OF REVIEW

Since this Court is reviewing the trial court's decision to grant the Plaintiff's Motion for Summary Judgment and to deny the Summary Judgment Motions filed by the Defendant and both Intervenors, the standard of review in this case is *de novo* with no

presumption of correctness. *Killingsworth v. Ted Russell Ford, Inc.*, 2006 LEXIS 900 (Tenn. 2006); *Godfrey v. Ruiz*, 90 S.W.3d 692 (Tenn. 2002); *Guy v. Mutual of Omaha Ins. Co.*, 79 S.W.3d 528 (Tenn. 2002).

ARGUMENT

I. Plaintiff's rejection of Lewis and Gordon violated the Tennessee Human Rights Act.

A. The race of the nominees on the first panel was the only reason the panel was rejected.

The rejection of Lewis and Gordon was based solely upon their race. The trial court's analysis completely misses that point when it concludes that, because the Governor wanted to consider "diversity" in making the appointment, the rejection of Lewis and Gordon was not based upon race. Of course, the rejection was based solely upon race. "Diversity," in this context, meant only race. The Governor's letter states, "With Chancellor Dinkins' withdrawal, I no longer have the opportunity to consider that factor [i.e., diversity]." The Governor's letter, therefore, refers to the fact that Chancellor Dinkins is African-American and Lewis and Gordon are not. The letter leads to the inescapable conclusion that solely because Lewis and Gordon are both Caucasian, the Governor rejected the panel. The letter does not say that he was rejecting the panel because there were only two remaining nominees or that he was seeking diversity on any basis other than race. The letter does not cite any deficiencies in the education, professional experiences, or community involvement of either Lewis or Gordon. It refers only to their race.

The issue, of course, is not whether the Governor could have permissibly considered race as a factor along with other individual characteristics in making his appointment had Chancellor Dinkins not withdrawn. Likewise, the issue is not whether the Governor could have permissibly considered race as a factor along with other individual characteristics when appointing from a second panel. The issue is the rejection, not the appointment. Lewis and Gordon had the right to be considered as individuals based upon their individual characteristics. They had the right to be judged upon characteristics other than their race. In other words, race may have been one factor which the Governor would have used to decide who to appoint, but race was the exclusive reason for his decision to reject the first panel. Despite his obvious qualifications and without any consideration of his qualifications, Lewis was rejected solely because he was one of two Caucasian nominees. His panel was rejected for one reason and one reason only – it was comprised of two white nominees.

No one should be excluded because of their race or the race of their fellow applicants. Such an approach is at profound variance with the Tennessee Plan and with basic notions of fair play, equal treatment, and equal opportunities based upon merit. All persons of similar circumstances must be treated alike. *State v. Whitehead,* 43 S.W.3d 921 (Tenn. Crim. App. 2000). If the trial court's decision is affirmed, this case will stand as precedent for the proposition that state government officials at all levels can make appointment decisions and hiring decisions based exclusively upon whether there are too many African-Americans in the applicant pool or too few, or too many Asians in the applicant pool or too few, or too many Hispanics in the applicant pool or too few, or too many Caucasians in the applicant pool or too few. There is no difference, legally,

between this rejection and a rejection based upon the fact that the applicant pool is all African-American, or all Hispanic, or all Asian.

On the other hand, if this Court reverses the trial court, this case will reaffirm the fundamental proposition that state government cannot reject applicants because of their race or the race of their co-applicants. Aside from violating the THRA and the constitutional guarantees of Equal Protection, the rejection of an applicant pool because of its racial composition perpetuates bitterness between the races and racial polarization. It sustains the myth that minorities need help to achieve. And, it supports the false assumption that people of different races approach dispute resolution differently and that people of the same race approach dispute resolution homogeneously. Decisions throughout state government must employ a color-blind approach, especially at the highest levels of state government.

B. The trial court erred when it held the THRA did not apply.

1. Application of the THRA to the rejection of the first panel is consistent with its stated purpose.

The THRA prohibits the rejection of the first panel on the basis of the racial composition of the panel. The THRA is part of Title IV of the Tennessee Code which deals with state government. The THRA is Chapter 21 entitled "Human Rights," and is found at Tenn. Code Ann. §§ 4-21-101 through 4-21-104.

As the trial court pointed out, Tenn. Code Ann. § 4-21-101 declares the purpose and intent of the chapter. The trial court, however, relied upon one subsection of § 4-21-101 without discussing it in the context of the other subsections. Tenn. Code Ann. § 4-21-101, in its entirety, provides:

4-21-101. Purpose and intent. – (a) It is the purpose and intent of the general assembly by this chapter to:

(1) Provide for execution within Tennessee of the **policies** embodied in the federal Civil Rights Act of 1964, 1968 and 1972, the Pregnancy Amendment of 1978, and the Age Discrimination in Employment Act of 1967, **as amended**;

(2) Assure that Tennessee has appropriate legislation prohibiting discrimination in employment, public accommodations and housing sufficient to justify the deferral of cases by the federal equal employment opportunity commission, the department of housing and urban development, the secretary of labor and the department of justice under those statutes;

(3) **Safeguard all individuals** within the state **from discrimination because of race**, creed, color, religion, sex, age or national origin **in connection with employment** and public accommodations, and because of race, color, creed, religion, sex or national origin in connection with housing;

(4) Protect their interest in personal dignity and freedom from humiliation;

(5) **Make available to the state their full productive capacity in employment;**

(6) Secure the state against domestic strife and unrest that would menace its democratic institutions;

(7) Preserve the public safety, health and general welfare; and

(8) **Further** the interest, rights, **opportunities** and privileges **of individuals within the state.**

(b) The prohibitions in this chapter against discrimination because of age in connection with employment and public accommodations shall be limited to individuals who are at least forty (40) years of age.

(Emphasis added.)

Although the trial court seized upon subsection (a)(1) in concluding that the THRA did not apply, subsection (a)(1) only states that it is the legislature's intent to

provide for execution within Tennessee of the "policies" embodied in the federal Civil Rights Act and the other statutes noted. See Tenn. Code Ann. § 4-21-101(a)(3) . Subsection (a)(3) of the THRA makes it clear that an independent purpose of the chapter is to safeguard "all" individuals within the state from discrimination because of race, creed, color, religion, sex, age or national origin "in connection with employment." *Id*. There are no individuals or categories of individuals who are excluded from the legislative purpose embodied in Tenn. Code Ann. § 4-21-101(a)(3) or (a)(8). There is no exclusion for appointees of any type or category. Certainly, subsections (a)(3) and (a)(8) provide more significant guidance on the issue of legislative purpose and intent as it relates to the issues before this Court than does subsection (a)(1) which was relied upon exclusively by the trial court.

Tennessee courts have made it clear that the THRA is different from Title VII and broader than the federal Acts and that its interpretation is not limited by any constraints found in federal law. In *Booker v. Boeing Co.*, 188 S.W.3d 639 (Tenn. 2006), this Court found that the THRA's statute of limitations must be construed differently from that found in Title VII because the express language of the section setting forth the THRA limitation period, Tenn. Code Ann. § 4-21-311(d), is "fundamentally different" than in Title VII. 188 S.W.3d at 648. Clearly, the definitions found in Title VII are, likewise, fundamentally different from the THRA. Moreover, in *Emerson v. Oak Ridge Research, Inc.*, 187 S.W.3d 365 (Tenn. App. 2005) (*permission to appeal denied* March 20, 2006), the court found that the THRA is a remedial statute, and therefore, the court is required to give a liberal construction to it to further its intent. 187 S.W.3d at 377. Very recently, this Court reaffirmed the purpose of the THRA enumerated in subsections (a)(3), (a)(4)

and (a)(8) in *Killingsworth v. Ted Russell Ford, Inc.*, 2006 LEXIS 900 at *7-10 (Tenn. 2006). In *Killingsworth*, this Court characterized the THRA as "comprehensive legislation." 2006 LEXIS 900 at *10; *see also Phillips v. Interstate Hotels*, 974 S.W.2d 680, 683 (Tenn. 1998).

Finally, in *Arnett v. Domino's Pizza I, L.L.C.*, 124 S.W.3d 529 (Tenn. Ct. App. 2003) , the court held that Domino's Pizza discriminated against African-Americans by refusing to deliver pizza to their neighborhood. The court noted that an opinion from the U.S. Court of Appeals for the Fourth Circuit, *Newman v. Piggy Park Enters., Inc.*, 377 F.2d 433 (4th Cir. 1967), was adverse to the claims of the plaintiffs in *Arnett*. The Court also noted that the trial court had held in favor of Domino's Pizza based upon federal law. In reversing the judgment of the trial court and rejecting the argument made by Domino's Pizza that the opinion from the Fourth Circuit controlled, the Court said,

> **We note as an additional matter that the language of the THRA, like many state acts prohibiting discriminatory practices, is broader than the federal Acts. *See generally, Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (E.D. Ill. 1992); *James v. Team Washington,* 1997 W.L. 633323, No. Civ. A. 97-00378 TAF (D.D.C. Oct. 7, 1997) (holding: Dominos a place of public accommodation under the D.C. Human Rights Act).** Dominos cites *Phillips v. Interstate Hotels Corp.*, 974 S.W.2d 680 (Tenn. 1998), for the proposition that the courts of this state are limited in their interpretation of the THRA by the interpretation of Title II. In support of this proposition, Dominos quotes the Tennessee Supreme Court in *Phillips* as stating: "[a]lthough the language differs slightly, it is clear that the legislature intended the THRA to be coextensive with federal law." *Phillips*, 974 S.W.2d at 683. However, the *Phillips* court did not end its analysis with this suggested limitation on the courts of this State to interpret the statutes of Tennessee. The Supreme Court continued its analysis, opining that the purpose of the THRA was to "provide for the execution of the *policies* embodied in the Federal Civil Rights Acts. *Id*. at 684 (emphasis added); *see Austin v. Shelby County Gov't,* 3 S.W.3d 474, 480 (Tenn. Ct. App. 1999), *perm. app. denied*. The *Phillips* court further added, "[w]e, therefore, may look to federal

> interpretation of Title VII [of the federal Civil Rights Act] for guidance in enforcing our own anti-discrimination statute. *We, however, are neither bound by nor limited by federal law when interpreting the THRA*." *Id.* (emphasis added).

(Bold emphasis added. Italics by the court.)

> Then, the Court of Appeals added,

> Dominos' reliance on one sentence drawn from *Phillips* must fail for two reasons. Although the **policies** of the federal Acts and the THRA are coextensive, i.e., to prohibit discrimination *inter alia*, places of public accommodation, **the reach of the THRA is in no way limited by the constraints found in the federal Acts. Second, the courts of this State are not bound by the federal courts, nor is our interpretation of this State's statute limited by federal interpretation of federal statutes.**

124 S.W.3d at 538-539 (emphasis added).

The trial court in this case committed the same error that the trial court committed in *Arnett*. It allowed an interpretative tool to override the language and purpose of the THRA.

2. <u>The definitions section of the THRA supports application of the THRA to the rejection of the first panel.</u>

The definitions section of Chapter 21 is found at Tenn. Code Ann. § 4-21-102. Tenn. Code Ann. § 4-21-102(3) provides:

> "Discriminatory practices" means **any** direct **or indirect act** or practice of **exclusion**, **distinction**, **restriction**, **segregation**, **limitation**, **refusal**, **denial**, **or any other act** or practice **of differentiation or preference in the treatment of a person or persons because of race**, creed, color, religion, sex, age or national origin;

(Emphasis added.)

Tenn. Code Ann. § 4-21-102(14) sets forth:

> "Person" includes **one (1) or more individuals**, governments, governmental agencies, public authorities, labor organizations, corporations, legal representatives, partnerships, associations, trustees, trustees in bankruptcy, receivers, mutual companies, joint stock companies, trusts, unincorporated organizations or other organized group of persons;

(Emphasis added.)

Unlike the definition of "employee" under Title VII, the definition of "person" under the THRA contains no exclusion for policy-making appointees. This exclusion simply does not appear anywhere in the THRA.

Tenn. Code Ann. § 4-21-102(4) provides:

> "Employer" means **the state, or any political or civil subdivision thereof,** and persons employing eight (8) or more persons within the state, **or any person acting as an agent of an employer, directly or indirectly**;

(Emphasis added.)

Tenn. Code Ann. § 4-21-311 provides that "any" "person" injured by "any act" in violation of the provisions of Chapter 21 shall have a civil cause of action in the Chancery or Circuit Court and, in such action, the court may issue any permanent or temporary injunction. Tenn. Code Ann. § 4-21-311.

3. Application of the THRA to the rejection of the first panel is consistent with Tenn. Code Ann. § 4-21-401(1) and Tenn. Code Ann. § 4-21-104(2).

Tenn. Code Ann. § 4-21-401 provides as follows:

> (a) It is a **discriminatory practice** for an employer to:
>
> (1) Fail or **refuse to hire** or discharge **any person or otherwise to discriminate** against an individual with respect to compensation, terms, conditions or privileges of employment **because of such individual's race**, creed, **color**, religion, sex, age or national origin; or
>
> (2) **Limit, segregate or classify** an employee **or applicants for employment in any way** that would **deprive or tend to deprive an individual of employment opportunities** or otherwise adversely affect the status of an employee, **because of race**, creed, **color**, religion, sex, age or national origin.

(Emphasis added.)

This section clearly prohibits the rejection of the first panel because its remaining two members are Caucasian. Moreover, Tenn. Code Ann. § 4-21-301 makes it a discriminatory practice to "aid, abet, incite, compel or command a person to engage in any of the acts or practices declared discriminatory by this chapter . . ." Tenn. Code Ann. § 4-21-301.

The clear language of the THRA prohibits the State (and the Governor as an agent of the State) from limiting, segregating, classifying or refusing to appoint applicants for this vacancy in "any way" which would "deprive" or "tend to deprive" the members of the rejected panel of employment opportunities on the basis of their race. Perhaps because the THRA fits this situation like a glove, there was no attempt by the trial court to conclude that if the THRA applies, the exclusion of the panel based upon its racial composition did not violate the THRA. The trial court's conclusion that the THRA does

not apply is deeply flawed for a number of reasons including, *inter alia*, the fact that the decision was based upon a Title VII exclusion that was not adopted by the Tennessee legislature.

4. Application of the THRA to judicial appointments is consistent with this Court's approach to statutory construction.

This Court has held, time and time again, that the cardinal rule of statutory interpretation is to give effect to the plain and ordinary meaning of the words chosen by the legislature. For example, in *Abel's ex rel. Hunt v. Genie Industries, Inc.*, 202 S.W.3d 99 (Tenn. 2006), this Court had before it the issue of whether the applicable statute of limitations contained in Tenn. Code Ann. § 28-3-104(a)(1) began to run against the tort claims of a legally-disabled individual once a legal guardian was appointed. In this Court's decision, this Court reaffirmed its longstanding approach to statutory construction.

> Our approach to statutory construction begins with the statute's language, and if it can end there – with our finding of a clear meaning of the legislature's intent – then we must stop. 'Our search for a statute's purpose begins with the words of the statute itself. If the statute is unambiguous, we need only to enforce the statute as written[,]' **with no recourse to the broader statutory scheme, legislative history, historical background, or other external sources of the legislature's purpose**.

202 S.W.3d at 101-102 (citing *Calloway v. Schucker*, 193 S.W.3d 509, 516 (Tenn. 2005)) (emphasis added).

Thus, this Court held that the statute of limitations remained tolled despite the possibility that a representative could bring the action on a disabled plaintiff's behalf. As this Court stated,

> The statute contains no language which would lead us to conclude that the legislature intended for removal of either of these two disabilities upon the appointment of a guardian. Had the general assembly intended to include such a provision, it could have done so. **This court is not inclined to read non-existent provisions into a statute.**

202 S.W.3d at 105 (emphasis added).

Likewise, in *Calloway v. Schucker*, 193 S.W.3d 509 (Tenn. 2005), this Court resolved the question of whether the three-year statute of repose for medical malpractice, which contains no exception for minority, was tolled during a plaintiff's minority. This Court held that the three-year statute of repose for medical malpractice actions is not tolled during the plaintiff's minority. *Id*. at 516. In resolving this issue, this Court stated:

> The touchstone of this Court's role in statutory interpretation "is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002) (quoting *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995)); *see also, State v. Fleming*, 19 S.W.3d 195, 197 (Tenn. 2000); *State v. Butler*, 980 S.W.3d 359, 362 (Tenn. 1998).
>
> We determine intent "from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning," *Fleming*, 19 S.W.3d at 197 (citing *Butler*, 980 S.W.3d at 362), and if the language of a statute is clear, we must apply its plain meaning without a forced interpretation. *Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn. 2000).

193 S.W.3d at 514.

In *Calloway*, this Court rejected the argument that the legislature intended that there be an exception for minors and held that because there was no express exception for minors contained in the Code, the plaintiff's minority did not toll the medical malpractice statute of repose. 193 S.W.3d at 516-517. As this Court said in *Calloway*, "We cannot,

under the guise of judicial interpretation of the statute, in effect rewrite the law and thus substitute our policy preferences for the legislature's." 193 S.W.3d at 517. In her dissent in *Calloway*, Justice Holder noted that a statute's meaning should be determined "from the act taken as a whole, viewing the legislation in light of its general purpose." 193 S.W.3d at 520 (quoting *Pearson v. Hardy*, 853 S.W.2d 497, 500 (Tenn. Ct. App. 1992)).

In this case, the trial court erroneously refused to apply the THRA to the rejection of the first panel of applicants, not because the trial court concluded that the rejection of the panel was lawful under the expressly prohibitive language of the THRA, but because the trial court determined that an exception for policy-making appointees found in Title VII should be read into the THRA. The trial court acknowledged that the exception was not found anywhere in the THRA, but concluded, "After studying both acts, the Court concludes that the **absence of the exception in the THRA cannot be characterized as having legal significance** so as to override the timeworn policy and law that the THRA mirrors the provisions of Title VII." (R. 242)(emphasis added). Respectfully, the trial court's approach to statutory construction conflicts dramatically with this Court's longstanding approach as reconfirmed by this Court so recently in *Abel's v. Genie Indus.* and *Calloway v. Schucker*. *See Abel's*, 202 S.W.3d 99; *Calloway*, 193 S.W.3d 509.

The trial court's decision disregards the clear language of Tenn. Code Ann. § 4-21-101(3) regarding the purpose of the chapter, disregards the definition of the terms "discriminatory practices," "employer" and "persons" found in Tenn. Code Ann. § 4-21-102, and disregards the clear, sweeping prohibitions of Tenn. Code Ann.

§ 4-21-401(1) and § 4-21-401(2). Instead of simply applying the express language of the THRA, the trial court determined the outcome of this case based on what the trial court characterized as a " policy" mistakenly described as "timeworn," that is inconsistent with this Court's directives on statutory construction. This Court, however, has made it clear that although Tennessee courts may appropriately look to decisions of federal courts when interpreting the THRA, federal court decisions do not bind or limit Tennessee courts, and Tennessee courts should give the fullest possible effect to Tennessee's own human rights legislation. *Phillips v. Interstate Hotels Corp.*, 974 S.W.2d 680, 684 (Tenn. 1998); s*ee also Davis v. Connecticut Gen'l Life Ins. Co.*, 743 F.Supp. 1282 (M.D. Tenn. 1990) (holding Tennessee law, not federal law, determined whether the parent was vicariously liable for the subsidiary's violation of the THRA). It does violence to the express terms of the THRA to import an exclusion from Title VII into the THRA which is altogether missing from the THRA.

5. The trial court's reliance on the lack of a definition for the term "employee" in the THRA is misplaced.

The trial court also erred when it speculated that the THRA does not contain a policy-level appointee exception because in Title VII that exception is contained in the definition of "employee" and the THRA does not include a definition for the term "employee." Actually, the Tennessee legislature chose to use the term "person" instead of "employee" in both Tenn. Code Ann. § 4-21-301 relating to discriminatory practices and in Tenn. Code Ann. § 4-21-401 with respect to employer practices. Since these provisions use the term "person" instead of the term "employee," which is the term used in Title VII, the list of definitions found in Tenn. Code Ann. § 4-21-102 contains a

definition of "person" but does not contain a definition of "employee." Tenn. Code Ann. § 4-21-102(14). The trial court erroneously attached great significance to the absence of any definition of the term "employee" but apparently attached no significance whatsoever to the fact that the definition of "person" in Tenn. Code Ann. § 4-21-102(14) contains no exclusion for public officials or policy-level appointees. And, since a state legislature regulating the employment practices of its own state government does not raise federalism concerns, it is understandable that the exclusion might be found in Title VII but not in the THRA.

The THRA's language is clear. The definitions of the term "person" and "discriminatory practice" are clear. As this Court held in *Abel's* and *Calloway*, if the legislature wished to fashion an exclusion similar to the one found in Title VII, it was incumbent upon the legislature to put such an exclusion into the statute. *See Abel's*, 202 S.W.3d at 101-102; *Calloway*, 193 S.W.3d at 514-517. This Court should not countenance an approach to statutory construction that imports into the THRA an exclusion found in a term defined only in Title VII which clearly contradicts the THRA's express definition of the term "person," especially when Title VII itself expressly states that Title VII should not be read to limit the reach of state laws. 42 U.S.C. § 2000e-7 (see § 6 of this brief). The legislature could have easily put an exclusion similar to Title VII's exclusion in the THRA, but chose not to do so.

The trial court's attempt to buttress its decision by noting that Title VII is part of a larger act is misguided. This point is makeweight. The definitions section of Title VII, which includes the policy-making exclusion relied upon by the trial court, only applies to

Title VII, not the entire Civil Rights Act, so it is difficult to understand why the trial court concluded that the placement of Title VII within the federal Civil Rights Act provides any significant guidance in the interpretation of the THRA.

The trial court's approach to construction of the statute, if taken to its logical extension, yields disturbing implications. The trial court concludes that, based upon "timeworn policy," provisions limiting the availability of relief under Title VII should be imported into the THRA. This Court's affirmance of the trial court's decision would imply, for example, that all persons who desire to make a THRA claim must file an administrative charge with the Equal Employment Opportunity Commission or the Tennessee Human Rights Commission before filing a complaint in Chancery or Circuit Court. The trial court's approach, if affirmed by this Court and taken to its logical conclusion, would have a profound, undesirable effect on the treatment of all claims under the THRA by importing into the THRA limiting provisions of Title VII not adopted by our legislature.

6. Section 708 of Title VII itself even supports the application of the THRA to the rejection of the first panel.

The trial court's analysis is also impeached by § 708 of Title VII itself. 42 U.S.C. § 2000e-7. This section is entitled "Effect on State Laws" and provides that no provision of Title VII (as in this case the exception for policy-making officials found in Title VII's definition of the term "employee") should be interpreted to limit the reach of existing state laws or of state laws enacted in the future. If, as the trial court's decision states, the THRA is to be construed in accordance with Title VII, then Title VII itself commands

that if the THRA is broader than Title VII, nothing in Title VII should be used to limit the THRA.

7. The fact that the policy-making appointee exclusion is not found in the THRA but other Title VII exclusions were expressly included in the THRA also supports the application of the THRA to the rejection of the first panel.

Although no exception for appointees at the policy-making level is found in the THRA, the Tennessee General Assembly did see fit to include in the THRA another exclusion found in Title VII. Tenn. Code Ann. § 4-21-406 provides that it is not a discriminatory practice for an employer to employ individuals on the basis of religion or sex in those situations where religion or sex is a *bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise ("BFOQ"). Tenn. Code Ann. § 4-21-406(4). Thus, the THRA expressly contains the Title VII exclusion for BFOQs but does not contain the exclusion relied upon by the trial court for appointees at the policy-making level. Clearly, then, the Tennessee legislature was aware of the exclusions in Title VIII and made its own choices regarding which Title VII exclusions to enact, and which Title VII exclusions to omit from the THRA.

8. The Trial Court's reliance on *Gregory v. Ashcroft* is misplaced because after the decision in *Gregory*, Congress enacted the GERA to expressly cover gubernatorial appointees, including appointees at the policy-making level.

Both the trial court and the Attorney General erroneously relied upon the United States Supreme Court's decision in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). (R. 240). Reliance upon *Gregory* is misplaced for at least two reasons. First, the trial court uses a federal decision grounded substantially on principles of federalism to hold that a

definition found only in a federal act should override the express provisions of a state act. Second, in the same year that *Gregory* was decided, Congress enacted the Governmental Employee Rights Act of 1991 (the "GERA"). See 42 U.S.C. § 2000e-16a. The purpose of the GERA is "to provide procedures to protect the rights of certain government employees, with respect to their public employment, to be free from discrimination on the basis of race, color, religion, sex, national origin, age or disability." 42 U.S.C. § 2000e-16a(b). Section 16c of the GERA is entitled, "Coverage of Previously Exempt State Employees." 42 U.S.C. § 2000e-16c. This section provides that the rights, protections and remedies provided pursuant to section 2000e-16b shall apply with respect to the employment of any individual chosen or appointed by a person elected to public office in any state, including appointees at the "policy-making level." 42 U.S.C. § 2000e-16c(a)(2).

The enactment of the GERA, including 42 U.S.C. § 2000e-16c, severely dilutes the significance of *Gregory* in this case because, if the trial court's decision to import the exclusion found in the definition of Title VII for the term "employee" was based upon a "timeworn policy" of interpreting the THRA to be consistent with the Civil Rights Act, then the trial court's decision is inconsistent with that policy. The same year *Gregory* was decided, Congress enacted the GERA in order to make it clear that race discrimination with respect to the employment of appointees of state-elected officials at the policy-making level is unlawful. Application of the THRA to policy-making appointees would be consistent with the GERA. The failure of the trial court to consider the effect of 42 U.S.C. § 2000e-16c is yet another serious flaw in the reasoning of the trial court.

9. The trial court's decision is contrary to this Court's own Equal Employment Opportunity policy which prohibits race discrimination and applies to "all state judges," as well as to "applicants" for employment.

On May 1, 2006, this Court issued Administrative Policy 2.02. This policy became effective thirteen weeks before the Governor's rejection of the first panel. The subject of this policy is "Equal Employment Opportunity." The expressly-stated purpose of the policy is "[t]o ensure that all individuals have equal employment opportunity." (Policy 2.02, Section II.) Section III entitled "Application" states that the policy applies "[t]o all state judges and paid or unpaid employees of the state court system who work or serve in a full-time or part-time status." (Policy 2.02, Section III.) Section IV of the Policy defines "Discriminatory Practices" as "[d]iscriminating in any aspect of employment, including, (1) hiring and firing, . . . [and] (13) employment decisions based on **stereotypes** or **assumptions** about the **abilities, traits,** or **performance** of individuals of a certain sex, national origin, religion, age, veteran status, disability, or **race**." (Emphasis added.) Section V of the Policy states "It is the policy of the judicial branch to promote equal employment opportunity for **all** judicial branch employees and **applicants** for employment." (Emphasis added.) The legal authority for Administrative Policy 2.02 is listed in Section I. There are nine separate statutory citations listed. The statutes listed which prohibit race discrimination are "Title VII of the Civil Rights Act of 1964," "T.C.A. Title 4, Chapter 21, Parts 1 and 4," and the "Tennessee Human Rights Act."

The trial court's decision denies a remedy under the THRA to applicants for state judgeships who have been denied employment opportunities based upon their race. The trial court's decision, therefore, interprets the Tennessee Human Rights Act in a manner which is wholly inconsistent with the purpose and express provisions of this Court's own

Equal Employment Opportunity policy contained in Section 2.02 of the Administrative Policies and Procedures of the Tennessee Supreme Court Administrative Office of the Courts. See www.tsc.state.tn.us/geninfo/Publications/Policies%202.02%20Equal %20Employment %20Opportunity.pdf; see also Appendix.

10. The Rules and Regulations of the Tennessee Human Rights Commission also support the application of the THRA in this case.

The Tennessee Human Rights Commission's Rules and Regulations make it clear that in the event that a federal guideline or regulation is inconsistent with the THRA or the Commission's regulations, the THRA controls. Rule 1500-1-.11(5) provides:

> Any federal guideline or regulation adopted and incorporated under this part that is inconsistent with the Tennessee Human Rights Act, or any regulation promulgated thereunder, shall be superseded by the Tennessee Human Rights Act or the appropriate regulation promulgated thereunder.

If this Court simply gives effect to the plain and ordinary meaning of the provisions of Tenn. Code Ann. §§ 4-21-101(3), 4-21-102(3), (4), and (14), 4-21-301, and 4-21-401, it is clear that there is no exception made under the Act for gubernatorial appointments of state judges. Applicants for judicial vacancies are "applicants" under Tenn. Code Ann. § 4-21-401(2). Judges are certainly state employees and the Governor is certainly an "agent" of the State of Tennessee. There is simply no exception contained in the Act which would render it inapplicable to this case. The trial court's approach to interpretation of the THRA, therefore, is contrary to the approach taken in Rule 1500-1-.11(5) of the Tennessee Human Rights Commission.

Manifestly, the Governor's rejection of the first panel limited, segregated, and classified the applicants on the first panel in a way which deprived the applicants on that panel of an opportunity for employment based solely upon their race. Rejecting a pool of applicants based upon its racial composition involves treatment of applicants which is disparate on its face with no justification. Thus, Lewis requests that this Court declare that the rejection of the panel violated the THRA and declare that it is the Governor's duty to fill the remaining vacancy from the first panel. This Court, of course, is the final arbiter of the application of the THRA. This Court is not and should not be bound by federal jurisprudence under Title VII or Title VII itself. *Booker v. Boeing Co.*, 188 S.W.3d 639 (Tenn. 2006).

II. Plaintiff's rejection of the first panel solely due to the race of the nominees violated the constitutional rights of Lewis and Gordon under the United States and Tennessee Constitutions.[1]

A. Racial classifications such as the rejection of the first panel solely because its remaining members were white are presumptively invalid.

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995) (quoting *Hirabayshi v. United States*, 320 U.S. 81, 100 (1943)). Under Article I, Section 8, and Article XI, Section 8, of the Tennessee Constitution, "all persons similarly circumstanced shall be treated alike." *State v. Whitehead*, 43 S.W.3d 921, 926 (Tenn. Crim. App. 2000);

[1] This Court has held that in equal protection cases, it generally uses an analytical framework similar to that used by the United States Supreme Court, despite linguistic and historical differences between the state and federal Constitutions. *Gallaher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003); *State v. Robinson*, 29 S.W.3d 476, 480 (Tenn. 2000). This Court, of course, is free to interpret the Tennessee Constitution as it sees fit.

State v. Robinson, 29 S.W.3d 476, 480 (Tenn. 2000). All racial classifications by government are "inherently suspect." *Adarand*, 515 U.S. at 223. Racial classifications by government officials are "presumptively invalid." *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993). The United States Supreme Court's decisions have repeatedly confirmed that all racial classifications must be subjected to the "strictest of judicial scrutiny," regardless of the race of the person asserting those rights and regardless of the allegedly benign motives of state government. *Johnson v. California*, 543 U.S. 499, 505 (2005); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

The United States Supreme Court has also repeatedly rejected distinctions between racial classifications by government or government officials as part of policies of "inclusion" and as part of policies of "exclusion." Regardless of the facially benign motives of the government actor involved, racial classifications must nevertheless be subject to strict scrutiny. In *Gratz*, for example, as in this case, no racial hostility was alleged. Nevertheless, the racial classification in *Gratz* was subjected to strict scrutiny and struck down. 439 U.S. at 270. Racial classifications by any government actor must be subject to the strictest judicial scrutiny, even where the government actor, in this case our Governor, does not act out of any racial animosity.

The United States Supreme Court has also rejected the application of any less exacting standard of scrutiny because of the special expertise of state or local officials. In *Johnson*, for example, the United States Supreme Court refused to defer to the judgment of state prison officials on race even where "those officials traditionally exercise substantial discretion." 543 U.S. at 509-15. And, in *Wygant v. Jackson Bd. of Educ.*, 476

U.S. 267, 275-76 (1996) (plurality), the Court rejected the school board's discretionary judgment regarding the educational benefits of a racially diverse faculty. As the United States Supreme Court said in *Goss v. Lopez*, 419 U.S. 565 (1975), the "Fourteenth Amendment . . . protects citizens against the state itself and all of its creatures – boards of education not excepted." 419 U.S. at 574 (citations omitted). Once a plaintiff demonstrates that a government actor uses a racial classification, the government must prove that the classification is narrowly tailored to achieve a compelling interest. *Johnson*, 543 U.S. at 506, n.1; *Gratz*, 539 U.S. at 270.

Equal protection jurisprudence in the United States Supreme Court is often said to begin with Justice Harlan's ringing dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896):

> In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . Our Constitution is color-blind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

163 U.S. 537 at 559 (Harlan, J., dissenting); *see also, Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that even a law which is "fair on its face" may still be applied with "an unequal hand").

Nevertheless, after the decision in *Brown v. Board of Education*, 347 U.S. 43 (1954), the fundamental color-blind principle was temporarily obscured. This departure was necessary because integration of previously segregated schools necessarily required public authorities to know the race of the students who were being reassigned in order to end historical segregation.

Outside the context of desegregation remedies, however, the color-blind principle still fully applies. As Justice Powell wrote in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." *Id*. at 307. Justice Powell's articulation of equal protection, although stated from a different perspective in a different context over eighty years after Justice Harlan's dissent in *Plessy*, is simply another way of saying that when government actors deal with citizens, their actions must be color-blind or they must be subjected to the strictest of judicial scrutiny. Accordingly, in *Bakke*, even on a record replete with evidence of the benefits of a racially diverse medical school student body and, even after recognizing that executive branch officials in the field of higher education were due some measure of deference, the United States Supreme Court nevertheless held unconstitutional a medical school admissions plan that automatically set aside sixteen percent of its seats for minorities, thereby automatically preferring members of certain racial groups "for no reason other than race." 438 U.S. at 307.

What did Justice Powell mean when he said that the University of California was making its decisions "for no reason other than race?" He certainly did not mean that the medical school admissions officials, part of the executive branch of the State of California, had adopted their plan out of sympathy for any particular race or out of animosity towards the races that were disfavored. Rather, Justice Powell recognized that the interest of California's state officials included "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession." *Id*. at 306. Nevertheless, despite this arguably benign motive, Justice Powell rejected that objective "as an unlawful interest in racial balancing" on the part of the government.

Thus, regardless of the motive of the state actor, Justice Powell saw preferences granted solely on the basis of race as "discrimination for its own sake." *Bakke*, 438 U.S. at 307. The United States Supreme Court in *Grutter v. Bollinger*, 539 U.S. 323 (2003), characterized such preferences as unlawful "racial balancing." 539 U.S. at 530.

The reason why ostensibly benign programs offend the Constitution derives from the express words of the document. The Fourteenth Amendment, Section One, states: "[Nor] shall **any state** . . . deny to **any person** . . . the equal protection of the laws." (Emphasis added.) In *Bakke*, Justice Powell characterized the Equal Protection Clause as "majestic in its sweep" and noted that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." 438 U.S. 265 at 281. The trial court's analysis fails to focus upon the individual equal protection rights of Lewis and Gordon – the impact of the racial classification upon them individually. Although the trial court acknowledges that "the [governor's] letter establishes that the intervenors were rejected because the panel they were included in did not afford the Governor the breadth of choices he wanted, one of those being diversity" (R. 245), the trial court erroneously focuses on the fact that the Governor's letter says that diversity is one of several factors which he would consider in making the appointment.

But, as discussed, the issue is not whether the Governor would have appropriately and constitutionally considered race as a part of an individualized, holistic consideration of the three individuals submitted to him in the second panel. The issue, rather, is whether the denial of individualized, holistic consideration to Lewis and Gordon, simply because they are both white, violates their individual constitutional rights. Thus, the

constitutional focus is not properly upon whether the Governor's promised treatment of the members of the second panel would pass constitutional muster. The focus must be upon whether the rejection of the first panel solely because of its racial composition violates Lewis and Gordon's rights to individual consideration of the merits of their application, a right to which they are clearly entitled under the United States Supreme Court's decisions in *Bakke*, *Grutter* and *Gratz*. This nomination was Lewis' only chance, and he lost it because the Governor would not accept an all-white panel.

Moreover, although tacitly acknowledging that racial classifications must be subject to strict scrutiny (R. 246), and after making the self-evident statement that equal protection claims "rise and fall on their facts," the trial court's opinion simply states,

> In that regard the intervenors have cited to the court no case involving the use of executive discretion in a policy level appointment or even approaching the facts of this case to authorize the court to weigh in on equal protection grounds to issue orders on how the governor can exercise his discretion to veto a panel.

(R. 246.)

In essence, then, the trial court's decision says to Lewis and Gordon that, unless they can cite a case on point, the trial court must deny them relief. Of course, given the express language of the equal protection clause, equal protection rights would apply even in the absence of precedent. Respectfully, however, Lewis submits that there are precedents squarely on point that were simply misapprehended or disregarded by the trial court.

The trial court's decision neither cites nor discusses *Bakke*, *Grutter*, or *Gratz*; nor does it deal with the express language of the Fourteenth Amendment itself, the language of which is clear, mandatory and majestic. And, of course, *Bakke*, *Grutter* and *Gratz* all

involved decisions made by higher eduction officials serving in the executive branches of the state governments of California and Michigan. *Bakke* and *Gratz* both struck down discretionary decisions made by executive branch officials in the area of higher eduction because those officials had exercised their discretion in a way which categorized groups of applicants on the basis of their race. Thus, the trial court unfairly concludes that the Intervenors provided no relevant precedents to support their position. Finally, *Gregory v. Ashcroft*, the only equal protection case even discussed by the trial court (R. 240-247), makes it clear in Section C of the opinion that Missouri's state judges had Equal Protection rights even though the age classification challenged in *Gregory* passed constitutional muster. 501 U.S. at 468-470.

Moreover, this Court should not lose sight of the fact that rejection of the first panel on the basis of its racial composition is antithetical to the stated purposes of the Tennessee Plan – to select the most qualified judges and insulate the process from politics (including racial politics). Tenn. Code Ann. § 17-4-101. The racial classification of an applicant, of course, is completely useless as a predictor of successful performance on the bench. Indeed, as any reference to recent census data would indicate, even the notion of which of the nominees qualifies for "minority" classification shifts in the sand from time to time and from jurisdiction to jurisdiction. See, for example, U.S. Census Bureau American Community Survey Data Profile Highlights for Shelby County at http://factfinder.census.gov; see also Appendix. Certainly, however, because the Governor's letter makes reference to Chancellor Dinkins' withdrawal, we know that the Governor rejected the first panel because there were no longer any African-Americans left on it. He rejected the panel for the sole reason that it contained only white nominees.

As the United States Supreme Court observed in *Miller v. Johnson*, "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the government must treat citizens as individuals not as simply components of a racial, religious, sexual or national class." 515 U.S. at 900-911 (1995). As Justice Kennedy said in his concurring opinion in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), "the moral imperative of racial neutrality is the driving force of the Equal Protection Clause." 488 U.S. at 518. And, in the years that followed *Bakke*, the United States Supreme Court has invalidated other governmental programs that used a racial classification for purposes other than remediation of the effects of past discrimination, a justification never even relied upon by our Governor. *E.g.*, *Adarand Constr. v. Slater*, 515 U.S. 200 (2000) (minority contract set asides); *Freeman v. Pitts*, 503 U.S. 467 (1992) (school desegregation); *Croson*, 489 U.S. 469 (minority construction contract set asides); *Wygant*, 476 U.S. 267 (1986) (race-based layoff protection policy).

Perhaps the strongest expression of the United States Supreme Court's unwillingness to countenance racial classifications was its decision in *Gratz v. Bollinger*, where the illegal component of the undergraduate school's admission plan was "only" twenty bonus points based upon race. 539 U.S. at 270. In *Gratz*, even though no one was rejected or accepted outright based upon any racial classification and even though there was no predetermined percentage of places in the undergraduate freshman class set aside for any particular race or classes of races (as in *Bakke*, 438 U.S. 265 (1978)), the Supreme Court nevertheless struck down the undergraduate school plan because applicants who were categorized as ethnic minorities received a twenty-point bonus based simply upon their racial classification. 539 U.S. at 270. In our context, then, our

Governor could not even use a point-ranking system to appoint judges which gave points based upon race, so he certainly cannot constitutionally reject panels outright based solely upon the panel's racial composition.

In her concurring opinion in *Gratz*, which was absolutely consistent with her majority opinion in *Grutter*, Justice O'Connor emphasized that the vice of the Michigan undergraduate plan was Michigan's use of a fixed and mechanically-applied arithmetic criteria based upon race. She distinguished the program struck down in *Gratz* from the consideration of race as one "plus" factor among many pursuant to an individualized, holistic review of each applicant, such as the program used at Harvard which was cited approvingly by Justice Powell in *Bakke* and the Michigan Law School admission program upheld in *Grutter*. Significantly, the policy upheld in *Grutter* did not even define diversity "solely in terms of racial and ethnic status." 539 U.S. at 306.

Thus, when Justice Powell's opinion in *Bakke* is read together with Justice O'Connor's opinions in *Grutter* and *Gratz*, the lesson becomes clear: the Equal Protection Clause of the United States Constitution does not countenance the mechanical use of classifications based upon race. Such a procedure necessarily discriminates against our citizens, "for no reason other than race." *Gratz*, 539 U.S. at 270 (quoting *Bakke*, 438 U.S. at 307). Decisions which are based upon race, regardless of how benign or even laudable such decisions may be, necessarily treat people not as individuals but as members of a racial group and are thus unconstitutional *per se*, just as the Tennessee Judicial Selection Commission determined on August 22, 2006. (R. 141.) *See Miller*, 515 U.S. at 911.

Although reasonable minds of different political orientations may debate indefinitely whether decisions such as the Plaintiff's decision to reject the first panel due to its racial composition promote the cause of amicable race relations in the long run, or whether they are ultimately counterproductive, the issue before this Court is neither political nor sociological. It is, simply, whether the panel was rejected "for no reason other than race." And, of course, no other reason has ever been given. Understandably, perhaps, both the Attorney General and the trial court attempt to avoid the conclusion that this decision was based upon race by pointing to the Governor's statement in his letter that he wanted to be able to "consider diversity" as a "factor." The trial court's analysis, however, is a red herring which ignores the reality of the result of the decision for Lewis and Gordon and every future nominee of similar circumstance. Exhibit "C" is a curiously proud admission that the Governor decided, at least for this particular vacancy, that an all-white panel was not acceptable. Exhibit "E," the Governor's second letter, simply confirms that there was only one "reason" for the decision – the racial composition of the panel. The Governor told the truth. There was no other problem except that Lewis and Gordon are both white.

It is painfully clear from Exhibits "C" and "E" that there were no factors other than race which contributed one iota to the decision to reject the panel. Even if this Court assumes that the Governor's motives were benign or even laudable and even though the Governor, like the Board of Regents in *Bakke* and the Faculty Admissions Committee in *Gratz*, is due a degree of deference, decisions based on no reason other than race exceed the Constitutional boundaries that confine the discretion of any state actor.

In striking down the special admission program in *Bakke*, Justice Powell explained what was impermissible about California's program:

> It tells applicants who are not Negro, Asian, or Chicano, that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded a chance to compete with the applicants from the preferred groups for the special admissions seats.

438 U.S. at 320-321.

Precisely the same statement may be made about Lewis. No matter how strong his qualifications, quantitative and extracurricular, including his own potential for contribution to a diversity of viewpoints, he was never afforded a chance to be considered as an individual.

As stated, the right to equal protection of the laws is an individual right. *Civil Service Merit Bd. of Knoxville v. Burson*, 816 S.W.3d 725, 732-733 (Tenn. 1991). Thus, this Court should approach this case from the perspective of Gordon and Lewis. The issue here is not whether the rejection violated the rights of a class of Caucasian lawyers or even other Caucasian applicants. As Justice O'Connor put it in *Grutter*,

> Because the Fourteenth Amendment protects '*person[s]* not *groups*,' all 'government action based on race – a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited – should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.'

539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227).

In *Grutter*, Justice O'Connor quoted Justice Powell's opinion in *Bakke*, in which he stated that, "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. 539 U.S. at 323. If both are not afforded the same protection, then it is not equal." *Bakke*, 438 U.S. at 289-290. In other words, if the first panel could not be rejected because it was all African-American, or all Hispanic, or all Asian, it cannot be rejected because it is all Caucasian.

The Governor's rejection of the first panel is far more draconian than the law school admission program which was upheld in *Grutter* or the bonus point ranking system which was struck down in *Gratz*, or the medical school admission school set aside program which was struck down in *Bakke*. This is not a case as in *Gratz* where Lewis was put at a competitive disadvantage in seeking the appointment. This is not a case where he was considered individually and holistically, as in *Grutter*, with race serving as a "plus" factor. This is a case where Lewis was rejected out of hand solely because neither he nor any remaining member of his panel was a member of an ethnic minority.

B. Strict scrutiny must be applied; the rejection of the first panel fails strict scrutiny.

Once this Court determines that the first panel was rejected based upon its racial composition, since race is a suspect class, this Court must examine the rejection of the panel using strict scrutiny review. *Civil Service Merit Bd. of Knoxville v. Burson*, 816 S.W.2d 725, 733 (Tenn. 1991). As Justice O'Connor put it in *Grutter*,

> We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." . . . This means

> that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. Absent searching judicial inquiry into the justification for such race based measures, we have no way to determine what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). We apply strict scrutiny to all racial classifications to "smoke out" illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.

439 U.S. at 319.

1. <u>The record is devoid of any evidence of any state interest which would justify the rejection of the first panel on the basis of its racial composition.</u>

There is no evidence in this record establishing that the state has any interest, compelling or otherwise, justifying the rejection of the first panel. In fact, although the trial court's decision seems to acknowledge that strict scrutiny applies, the trial court's decision does not discuss any facts in the record which would show that there was any state interest served by the rejection of the first panel. (R. 246-248.) Moreover, as is relevant also to the issue of whether the rejection was narrowly tailored, at the time the first panel was rejected, no one could even predict whether the second panel would contain one African-American, two African-Americans, three African-Americans, or no African-Americans. Arguably, therefore, the issue here is not even whether the State has an interest in a racially-diverse Supreme Court, but whether the state has an interest in keeping the members of the first panel off this Court.

In any event, there is not a scintilla of evidence in the record that the State of Tennessee has any interest, compelling or otherwise, in having this vacancy filled by an African-American lawyer, as opposed to a Hispanic lawyer, or an Asian lawyer, or a

lawyer of European descent, or a lawyer who is an immigrant citizen from any country in the world. Indeed, as Justice O'Connor taught us in *Grutter*, "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path of leadership be visibly open to talented and qualified individuals of every race and ethnicity." 539 U.S. at 332.

There is no evidence whatsoever in this record that the rejection of this panel or the service of a minority lawyer on this Court would render unto our citizens a Tennessee Supreme Court which would work harder, decide cases more quickly or wisely, write opinions with greater clarity, protect the rights of our citizens with greater care, enforce remedies that are more just, adopt better court rules, or regulate the practice of law more effectively. Nor is there any evidence that our African-American citizens will accept the role and authority of this Court more fully because the Governor rejected the all-white panel. In any event, of course, the U.S. Supreme Court expressly rejected the "role model" justification when it struck down the Jackson Board of Education's protection of African-American employees from layoffs in *Wygant v. Jackson Bd. of Educ.*, 416 U.S. 267, 274-276 (1986); *see also Richmond v. J.S. Croson Co.*, 488 U.S. 469 (1989). On the contrary, as Justice Powell recognized *Bakke*, racial classifications or preferential treatment for one race may "… reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." 438 U.S. at 298; s*ee also*, *Defunis v. Odegaard*, 416 U.S. 312, 343 (1974) (Douglas J., dissenting).

This case stands in stark contrast to *Bakke* and *Grutter* and *Gratz*, where there was a fully-developed record in the trial court containing evidence that a racially-diverse California medical school class or a Michigan law school or undergraduate class provided educational benefits to the members of those classes. In this case, there is no evidence in the record on the issue of the impact, if any, of racial diversity on this Court. This record contains nothing which allows the rejection of the first panel to survive even the lowest level of scrutiny. Because the Attorney General resisted Gordon's efforts to delay a hearing in the trial court to allow discovery in this matter (R. 95-105), it is fair to assume that the Attorney General had no such evidence, or he would have placed that evidence into the record in the trial court. This record is simply devoid of any proof that filling the remaining vacancy on this Court with a person of any particular race will have any impact, positive or negative, on this Court. This record certainly pales in comparison to the record in *Grutter*, for example, where there was an "extensive" record compiled over the course of a fifteen-day bench trial. 539 U.S. at 309.

Finally, this case is far from analogous to the desegregation cases or the minority contract set-aside cases, where there was an alleged history of past discrimination. Here, there is uncontradicted evidence in the record that there has never been so much as an accusation of any form of racial discrimination with respect to the appointments made by Tennessee Governors under the Tennessee Plan or with respect to the nominees recommended by the Tennessee Judicial Selection Commission under the Tennessee Plan. (R. 161.) Even Exhibit "C," the Governor's first letter, notes, "The State has been privileged over the past thirteen (13) years to have an excellent Supreme Court that reflects the diversity of Tennessee."

2. The rejection of the first panel was an outright rejection; therefore, it cannot satisfy the narrowly-tailored requirement.

Even if the state had proven any state interest justifying the rejection of the first panel based upon its racial composition, the rejection of the panel is the antithesis of the narrowly tailored approach that strict scrutiny requires. As the opinions in *Bakke, Grutter* and *Gratz* made clear, a holistic approach based upon all of the individual characteristics of applicants is the touchstone requirement of the U.S. Supreme Court's equal protection jurisprudence.

The complete elimination of Lewis from any opportunity to be considered for this vacancy is far from a narrowly-tailored approach. In *Bakke*, Justice Powell cited approvingly to the Harvard admissions program which allowed ethnicity to be considered along with all other individual characteristics in the determining whom to admit to Harvard. 438 U.S. at 265. And in *Grutter*, the United States Supreme Court approved a law school admission program which provided individualized holistic consideration to the applicants and, therefore, closely hewed to the Harvard program discussed approvingly in *Bakke*. *See* 539 U.S. at 306.

In his memorandum filed in the trial court, the Attorney General implicitly acknowledged that strict scrutiny applies, by arguing that the Governor's exclusion of the panel was narrowly tailored because it was his "only available option." (R. 196.) The Governor, however, passed upon an opportunity to appoint Chancellor Richard Dinkins to the Supreme Court only three months earlier. And, there is no evidence in the record to suggest that the Governor, in advance of the rejection of the first panel, made any specific effort to encourage minority lawyers to apply, encouraged the Commission to

encourage minority lawyers to apply, or even encouraged the Commission to recommend minority lawyers as he did when he sent Exhibit "C" following the rejection of the first panel. Thus, there is nothing in the record to indicate that less draconian measures were ever considered or tried.

There is likewise no indication in the record that Lewis and Gordon were ever considered based upon any of their individual characteristics. The record is devoid of any indication that there was any consideration of the diverse characteristics that Lewis or Gordon might bring to the Court because of their education, or professional experiences, or life experiences. Significantly, this Court has held in other contexts that providing an officeholder with the opportunity to become familiar with an applicant's "ability, character, and reputation" is so important that the state has a compelling interest in the officeholder having an opportunity to judge an applicant's individual qualifications. *Hatcher v. Bell*, 521 S.W.2d 799, 803-804 (Tenn. 1974). Another option available to the Governor would be to work with the Commission to encourage quality applicants of all races (not just African-Americans, but lawyers of all ethnic backgrounds including, for example, Hispanic and Asian lawyers), to offer themselves for judicial service for future vacancies on all of the courts of this state.

In the final analysis, however, there can be no constitutional justification for the outright rejection of a panel of applicants solely because they are Caucasian. Although the Judicial Selection Commission itself is diverse, the Tennessee Plan stops short, as it must, from directing the Commission to recommend applicants based upon race. The Tennessee Plan contains no statutory authorization for the Governor to reject or appoint

applicants or to reject panels of applicants solely on the basis of race. Nor should it. Nor could it. There is no narrowly-tailored approach that allows for a mechanistic elimination of applicants based solely upon race.

III. The appropriate remedy is an order from this Court directing the Governor to fill the remaining vacancy from the first panel.

Of course, if this Court finds that the rejection of the first panel based upon its racial composition violates the Tennessee Human Rights Act, or if this Court finds that the rejection of the first panel violates the United States Constitution, or if this Court finds that the rejection of the first panel violates the Tennessee Constitution, Lewis and Gordon would be entitled to appropriate relief pursuant to this Court's equitable jurisdiction and/or pursuant to Tenn. Code Ann. § 4-21-311. In keeping with general principles of equity, the appropriate remedy would be to place Lewis and Gordon in the same position they would have been in before their statutory and constitutional rights were violated. Accordingly, the traditional equitable remedy would be a declaration from this Court that the Governor's duty is to fill the remaining vacancy on this Court from the names on the first panel. Aside from affording equity and justice to Lewis and Gordon, this remedy has several additional salutary characteristics.

This remedy renders the procedure for filling this vacancy consistent with the procedure used for filling prior vacancies in circumstances where a member of a panel recommended by the Commission withdrew their name from consideration for the appointment. Thus, this remedy is consistent with past practice. This remedy also eliminates the need and the concomitant delays resulting from reconvening the seventeen-member Commission, two members of which have been replaced since Lewis

was recommended on July 17, 2006. See www.tsc.state.tn.us/geninfo/Publications/Forms/JudicialApplications/judselcom.pdf.

This remedy represents an exercise of judicial restraint because there is no express statutory provision for the Commission to recommend fewer than three names or to provide a "substitute" when a withdrawal occurs. The only authority given the Commission in the Tennessee Plan is to recommend one or, if necessary, two panels of names. Even the Attorney General argued in the trial court that the Commission had no statutory authority to send a new name to replace Chancellor Dinkins. The state's argument below was that Chancellor Dinkins remained "on the panel" even though he withdrew. (R. 180-184; Hearing transcript, pp. 8, 13, 18.) If the state is correct in that position, there are no open seats on the first panel. Moreover, in the history of the Tennessee Plan, no Governor has ever requested that an additional name be sent to replace an applicant who withdrew, and the Commission has never sought the opportunity to send a replacement. No such request was made by the Governor or the Commission in this instance.

Finally, this remedy removes the need for this Court or for the Commission to resolve thorny issues relating to which applicants should be eligible to be sent as a replacement for Chancellor Dinkins. For example, would any lawyer in West or Middle Tennessee of the requisite age be eligible to apply to replace Chancellor Dinkins? Must the age and residency requirements be met as of July 17, 2005, or as of the date of the next Commission meeting? Or, would the Commission choose only from those lawyers who applied and were interviewed at the July 17th meeting? In the alternative, would the

Commission choose from those lawyers who applied and were interviewed at the September meeting? Declaring that the Governor's duty is simply to fill the remaining vacancy from the first panel allows this Court (and/or the Commission) to pretermit those issues.

If this Court sees fit, rendering a decision in favor of Lewis and Gordon on constitutional or THRA grounds would also afford this Court the opportunity to pretermit the issue raised by the Governor as to whether names on a rejected panel may be sent back to the Governor in a second panel. This result would also enable this Court, if it sees fit, to pretermit the issue raised by Mr. Gordon as to whether the Governor has the right to appoint from, or reject, a panel of fewer than three names. Thus, an order directing that the appointment be made from the first panel provides the most final, the most narrow, the most judicially restrained, and the speediest route to the resolution of all issues relating to the filling of the last remaining vacancy on this Court.

CONCLUSION

Based upon the provisions of the Tennessee Human Rights Act, the United States Constitution and the Tennessee Constitution, Lewis respectfully requests that this Court hold that the rejection of the first panel solely because its remaining nominees are Caucasian was unlawful and that the duty of the Governor is to fill the remaining vacancy on this Court from the names sent him on the first panel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by the means indicated this 12th day of January, 2007, to:

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